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In the Supreme Court of the United States

OCTOBER TERM, 1984

J. WILTON HUNT, SR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether when a defendant attempts to show that the government did not initiate its investigation of the defendant in good faith, the government may respond by introducing evidence of the allegations that prompted the investigation.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-30a) is reported at 749 F.2d 1078.

JURISDICTION

The judgment of the court of appeals was entered on November 28, 1984. A petition for rehearing was denied on February 4, 1985. The petition for a writ of certiorari was filed on Marcn 6, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of North Carolina, petitioner was convicted on one count of conspiracy to engage in racketeering activities, in violation of 18 U.S.C. 1962(d); and one count of use of an interstate facility in aid of racketeering, in violation of 18 U.S.C. 1952(a). Petitioner was sentenced to 14 years in prison on the conspiracy count and a concurrent two-year term on the substantive count. The court of appeals affirmed (Pet. App. 1a-30a).

1. The evidence at trial, as summarized in the opinion of the court of appeals, showed that between 1980 and mid-1982 the Federal Bureau of Investigation conducted an undercover investigation into corruption of public officials in Columbus County, North Carolina. During this period petitioner was a judge on the North Carolina District Court for the 13th Judicial District, which included Columbus County. He presided over misdemeanor cases and traffic offenses. Pet. App. 2a.

In August 1980, the FBI received a report from Joseph Moody, who was scheduled to appear before petitioner on an assault charge, that petitioner was willing to accept a bribe. The FBI gave money to Moody to deliver to a middleman who was to meet with petitioner. The meeting with petitioner never took place and the middleman apparently pocketed the bribe money. Pet. App. 2a-3a. Two months later, Moody informed the FBI that another individual, James Carroll, "claimed that he could 'deliver' [petitioner]" (*id.* at 3a). An FBI undercover agent posing as a member of a criminal syndicate met with Carroll and expressed interest in purchasing a club operated by Carroll in Columbia County to use as a

front for various illegal activities including drug sales and prostitution. The court of appeals stated that Carroll told the agent that "he was acquainted with [petitioner] and that [petitioner] would be available for protection payments." *Ibid.*

Carroll arranged for the undercover agents to meet with petitioner on November 20, 1980.[1] At that meeting the agents discussed their plans for the club, which included an illegal poker game. Petitioner advised the agents that if the game were raided it was unlikely that anyone would receive a jail sentence for a first offense. The agents made no explicit offer of money at this meeting, but Carroll subsequently made clear to petitioner that the agents were "interested in paying $1500 a month for [petitioner's] protection. [Petitioner] replied, 'That sounds good.'" Pet. App. 4a.

On December 3, 1980, a meeting took place between an undercover agent, Carroll, and petitioner at which the agent explained the need for "protection" for the gambling enterprise. The agent gave Carroll an envelope containing $1,000 in cash and Carroll gave the envelope to petitioner. Petitioner "said that he had never taken money before and found it difficult, but then proposed that the money be considered a 'campaign contribution.'" Pet. App. 4a. Petitioner subsequently requested the remaining $500, which was delivered to him by Carroll (*ibid.*).

Over the next nine months, petitioner received five payments totaling $7,500. Petitioner agreed to set low bonds for any of the undercover agent's associates arrested on gambling or drug charges, reduced the penalties on traffic citations issued to two of the

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[1] The agents' meetings with Carroll and petitioner were secretly recorded.

agent's undercover associates, assisted the agent in obtaining a license for a gold and silver business that was to be used as a front for drug smuggling, agreed to talk to a local sheriff and " 'put his mind at ease' " about the agent's drug smuggling plans, and gave the agent the telephone number of a local bookmaker. The undercover operation was terminated in November 1981 in response to petitioner's concern about rumors that he had been linked with a drug operation. Pet. App. 5a-6a.

2. Petitioner's convictions were affirmed by a divided court of appeals (Pet. App. 1a-22a). The majority rejected petitioner's claim that the district court improperly admitted evidence of the allegations of unlawful conduct involving petitioner that were known to the FBI at the start of its investigation. The court noted that petitioner had argued that the government "had 'no evidence of [petitioner's] illegal conduct other than that initiated by its own operatives' " and had attempted to establish this fact during the cross-examination of an FBI undercover agent at trial (*id.* at 9a). The court of appeals concluded that "the testimony * * * claimed to be objectionable was only introduced after persistent efforts of the defense to call into question the government's basis for investigating [petitioner] at all" (*id.* at 10a). It held that "where a defendant elects to challenge the government's conduct of an investigation, the government may introduce rebuttal evidence, even though it would amount to hearsay if it were intended to prove the truth of matters asserted, for the limited purpose of demonstrating that the investigation was reasonable and free of improper motive" (*id.* at 12a (footnote omitted)).[2]

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[2] The court of appeals also rejected petitioner's claims that his entrapment defense had been established as a matter of

Judge Sprouse dissented (Pet. App. 22a-30a). He stated that petitioner had not raised the issue of the government's good faith in a manner that permitted the admission of the evidence, and that admission of this evidence allowed the jury to rely upon hearsay testimony in rejecting petitioner's entrapment defense.

ARGUMENT

The decision of the court below is correct and does not conflict with any decision of this Court or another court of appeals. Further review therefore is not warranted.

1. Petitioner's principal claim (Pet. 6-10) is that the court below incorrectly permitted the government to rebut his entrapment defense by introducing hearsay testimony showing his predisposition to engage in criminal activity.[3] This assertion completely mischaracterizes the decision of the court of appeals. The government did not contend below that otherwise inadmissible hearsay can be introduced in order to show the defendant's predisposition (see Pet. App. 7a-8a), and the court of appeals did not adopt a rule permit-

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law because there was insufficient evidence of his predisposition to engage in the offenses (Pet. App. 13a-17a), that the government's conduct of the investigation was so outrageous that it violated due process (*id.* at 18a-20a), and that petitioner was not subject to prosecution under the Racketeer Influenced and Corrupt Organization Act because he was not a member of "organized crime" (*id.* at 20a-21a).

[3] An entrapment defense can prevail only if "the Government's deception actually implants the criminal design in the mind of the defendant." *United States* v. *Russell*, 411 U.S. 423, 436 (1973). Thus, "the principal element in the defense of entrapment [is] the defendant's predisposition to commit the crime." *Id.* at 433.

ting the introduction of such testimony. The court noted that "every circuit to have considered the use of hearsay in entrapment cases" has rejected the use of otherwise inadmissible hearsay, and concluded that "had the testimony of [the FBI agents] been elicited as proof of the matters asserted, in order to show the defendant's predisposition to commit the offenses charged, there would be legitimate doubt as to its admissibility" (*id.* at 8a).

As the court below demonstrated (Pet. App. 9a-12a), the hearsay issue in this case arose in a completely different context. Petitioner sought dismissal of the indictment before trial on the ground that the government's investigation violated his due process rights. This claim rested in part upon petitioner's assertion that the government "had 'no evidence of [petitioner's] illegal conduct other than that initiated by its own operatives.'" *Id.* at 9a. At trial, during cross-examination of the first FBI agent to testify, petitioner's counsel "sought to establish that the FBI had no evidence that petitioner might be corrupt before commencing the investigation." *Ibid.*; see C.A. App. 282-284. Counsel for the government requested a bench conference and informed the court that the agent was attempting to avoid discussing reports that indicated that petitioner previously had been involved in criminal activity (C.A. App. 284). Petitioner's counsel stated that he wanted such material put on the record, and responded affirmatively when the court inquired "if he puts [these allegations] in now, are you prepared to run with that?" (*ibid.*).

Following this exchange, the government elicited testimony from the other FBI agents concerning the information about petitioner available to the government at the onset of its investigation. The agents

testified that they had information that petitioner had taken for his personal use guns seized as evidence, attempted to purchase stolen guns, and "taken care of" firearms charges lodged against a cousin. C.A. App. 483-485, 722-725. The district court stated that the testimony was admissible because it went to "probable cause, state of mind" and "what information [the government] had" (*id.* at 482, 725).[4] The court below correctly held that "the government was * * * entitled to develop its rebuttal to [petitioner's] due process theory * * *, once the defense called the government's conduct into question. Having 'opened the door' the defendant may not be heard to complain of testimony which proved adverse to his position that the government had no reason to investigate him." Pet. App. 11a (footnote omitted); see also *United States* v. *Webster*, 649 F.2d 346, 351 (5th Cir. 1981) (en banc); cf. *United States* v. *Young*, No. 83-469 (Feb. 20, 1985), slip op. 9-12.[5]

2. Petitioner asserts (Pet. 10-11) that the effect of the decision below is to require a defendant to choose between an entrapment defense and a due process

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[4] This testimony did not constitute hearsay because it was offered in evidence only to establish the state of the government's knowledge, not "to prove the truth of the matter asserted." Fed. R. Evid. 801(c); see also Pet. App. 11a-12a; *United States* v. *Scott*, 678 F.2d 606, 612 (5th Cir.), cert. denied, 459 U.S. 972 (1982).

[5] The admission of this evidence did not prejudice petitioner's entrapment defense. As the court below found (Pet. App. 15a-17a), the jury could infer petitioner's predisposition from his willing acceptance of the series of bribes. Moreover, the question whether this small amount of testimony (six pages out of a transcript that totaled more than 1,000 pages) was prejudicial was a matter to be resolved by the trial court. Fed. R. Evid. 403.

claim, presumably because evidence relating to the due process claim might undermine the entrapment defense. Petitioner is incorrect.

The defense of entrapment is a matter to be submitted to the jury, while a claim that the government's conduct was so outrageous that it violated due process is decided by the trial judge. A claim of outrageous government conduct typically is resolved through a post-trial hearing. See *United States* v. *Dyman*, 739 F.2d 762 (2d Cir. 1984), cert. denied, No. 84-5476 (Jan. 21, 1985); *United States* v. *Williams*, 705 F.2d 603, 619-622 (2d Cir.), cert. denied, No. 83-256 (Dec. 5, 1983); *United States* v. *Myers*, 692 F.2d 823, 828-829 (2d Cir. 1982), cert. denied, 461 U.S. 961 (1983). Thus, a defendant can raise an entrapment defense at trial, and, if the defense proves unsuccessful, present evidence concerning the due process claim at a post-trial hearing. The decision below relates only to the unusual situation in which the defendant chooses to raise the due process issue before the jury.

Petitioner plainly made a tactical decision to adduce evidence relating to the due process claim through questioning at trial. He apparently believed that the jury might be influenced in his favor if he could show that the government had no incriminating information at the time it started its investigation. Having adopted this course of action, petitioner cannot now argue that the government should have been barred from introducing its rebuttal evidence relating to the due process claim. The admission of this evidence was a result of petitioner's own strategy and provides no grounds for a challenge to the decision below.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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